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Supreme Court of the United States

October Term, 1963

No. 857

ROBERT F. TROST,

Petitioner,

against

AMERICAN HAWAIIAN STEAMSHIP COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions of the Courts Below	1
Jurisdiction	2
Statute Invoked	2
Statement of Facts	3
Reasons For Granting the Writ	5
(a) The duty to provide a safe place to work	7
(b) The duty to warn	8
(c) Course of employment	13
(d) Derivative liability	17
Conclusion	19
APPENDIX:	
Opinion of United States Court of Appeals for the Second Circuit	1a
Letter, Dated November 18, 1963	7a
Judgment	8a
Petition for Rehearing	9a
Petition for Rehearing in Banc	10a
Findings of Fact and Conclusions of Law of United States District Court for the Southern District of New York	11a
Supplemental Findings of Fact and Conclusions of Law of United States District Court for the Southern District of New York	16a
Judgment of United States District Court	19a

Cases Cited

	PAGE
Alpha v. Cain, 281 U. S. 642	14
Anderson v. Chamberlin, 298 P. 2d 901, 142 C. A. 2d 591	14
Anderson v. Continental, 218 F. 2d 84	7
Arizona v. Anelich, 298 U. S. 110	5
Armit v. Loveland, 115 F. 2d 308	15
Atlantic v. Gunter, 229 F. 2d 842	9
Badalamenti v. United States, 160 F. 2d 422	14
Bailey v. Central, 319 U. S. 350	12
Bailey v. Rome, 139 N. Y. 302	13
Beadle v. Spencer, 298 U. S. 124	7
Becker v. Waterman, 179 F. 2d 713	7
Bisso v. Miller, 233 F. 2d 855	6, 7
Braen v. Pfeifer, 361 U. S. 129	16
Brailas v. Shepard, 152 F. 2d 849	14, 17
Brown v. Mallory, 122 F. 2d 98	7
Buckeye v. McDonough, 200 F. 2d 558	16
Cahill v. New York, 350 U. S. 898, rev'g 224 F. 2d 637	9
Carney v. Pittsburgh, 316 F. 2d 277	14, 18
Carr v. Standard, 181 F. 2d 15	7
Casso v. Pennsylvania, 219 F. 2d 303	15
Cervo v. Isbrandtsen, 178 F. 2d 919	7
Chesapeake v. Newman, 243 F. 2d 804	6
Civil v. Waterman, 217 F. 2d 94	15, 18
Cleveland v. Martini, 96 F. 2d 632	8
Cortes v. Baltimore, 287 U. S. 367	5
Cox v. Roth, 348 U. S. 207	5
Davis v. Parkhill, 302 F. 2d 489	8
Deryishoglu v. Boyazides, 44 F. Supp. 385	9
DeZon v. American, 318 U. S. 660	7, 17, 18
Ellis v. Union, 329 U. S. 649	12
Emmy, The, 55 F. Supp. 60	9

PAGE

Fodera v. Booth, 157 F. 2d 795 9

Gardiner v. New York, 146 F. 2d 420 7
Garrett v. Moore-McCormack, 317 U. S. 239 5
Greco v. Lorentzen, 139 F. 2d 113 6
Guerrini v. United States, 167 F. 2d 352 9
Gutierrez v. Waterman, 373 U. S. 206 ..... 9, 16

Hanson v. Luckenbach, 65 F. 2d 457 7
Holley v. Manfred, 269 F. 2d 317 12
Holm v. Cities, 60 F. 2d 721 16
Hough v. Railway, 100 U. S. 213 8

Interocean v. Topolofsky, 165 F. 2d 783 8

Jamison v. Encarnacion, 281 U. S. 635 ..... 5, 14
Jensen v. United States, 184 F. 2d 72 ..... 7, 15, 18
Johnson v. Griffiths, 150 F. 2d 224 7
Johnson v. United States, 333 U. S. 46 7
Justillian v. Versaggi, 169 F. Supp. 71 9

Kaminski v. Chicago, 200 F. 2d 1 12
Kennair v. Mississippi, 197 F. 2d 605 6
Kobaler v. Presque, 141 F. 2d 490 7
Kreigh v. Westinghouse, 214 U. S. 249 8
Kunschmann v. United States, 54 F. 2d 987 9
Kyriakos v. Goulandris, 151 F. 2d 132 ..... 17, 18

Lopoczyk v. Chester, 152 F. 2d 457 6
Lykes v. Grubaugh, 128 F. 2d 387, Mod. 130 F. 2d 25 17

Mahnich v. Southern, 321 U. S. 96 7
Marceau v. Great Lakes, 146 F. 2d 416 16
McAllister v. Cosmopolitan, 169 F. 2d 4, 337 U. S. 783 12
McAllister v. United States, 348 U. S. 19 6
McKie v. Diamond, 204 F. 2d 132 16
Mitchell v. Wingard, 323 P. 2d 908, 52 Wash. 2d 121 17
Monteiro v. Pago, 93 F. Supp. 93 7
Mostyn v. Delaware, 160 F. 2d 15 15

Nelson v. American, 80 F. 2d 730 14
Norland, The, 101 F. 2d 967 9

	PAGE
Northwestern v. Danielson, 57 F. 915	13
Nowery v. Smith, 69 F. Supp. 755, aff'd 161 F. 2d 832	14
O'Donnell v. Great Lakes, 318 U. S. 36	16
Palazzolo v. Pan-Atlantic, 211 F. 2d 277, aff'd 349 U. S. 901	9
Pariser v. City, 146 F. 2d 431	7
Pedersen v. United States, 122 F. Supp. 614, aff'd 224 F. 2d 212	14
Pioneer v. Hill, 227 F. 2d 262	8
Pittsburgh v. Palo, 64 F. 2d 198	16
Pontin Brothers, 47 F. 2d 595	9
Potter v. Ohio, 134 F. 2d 432	7
Rey v. Colonial, 116 F. 2d 580	7
Robert v. United States, 240 N. Y. 474	13
Rolph, The, 299 F. 52	7
Sadler v. Pennsylvania, 159 F. 2d 784	8
Salem v. United, 370 U. S. 31	7
Sanford v. Caswell, 200 F. 2d 830	8
Sante v. Holmes, 202 U. S. 438	8
Seas v. Sieracki, 328 U. S. 85	14
Senko v. La Grosse, 352 U. S. 370	16
Shenker v. Baltimore, 374 U. S. 1	10
Sinkler v. Missouri, 356 U. S. 326	15
Socony-Vacuum v. Smith, 305 U. S. 424	5
Southern v. Firipis, 285 F. 2d 651	9
Spellman v. American, 176 F. 2d 716	7
States v. Berglann, 41 F. 2d 456	16
Stevens v. O'Brien, 62 F. 2d 632	17
Storgard v. France, 263 F. 545	16
Stratton v. United States, 8 F. Supp. 429	16
Sundberg v. Washington, 138 F. 2d 801	14, 15, 18
Thompson v. Eargle, 182 F. 2d 717	14
Union v. Stapleton, 237 F. 2d 229	12

PAGE

Vanderlinden v. Lorentzen, 139 F. 2d 995 12

Warner v. Goltra, 293 U. S. 155 5

Wong v. Suburban, 119 F. 2d 745 ..... 14, 16

Zinnel v. United States, 10 F. 2d 47 7

Statutes Cited

Jones Act, 46 U. S. C. § 688 ..... 2, 5

28 U. S. C. § 1254(1) 2

Supreme Court of the United States

October Term, 1963

No.

ROBERT F. TROST, *Petitioner,*

against

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit in the above entitled matter, entered on October 25, 1963, and Orders of that Court denying Petitions for Rehearing and for Rehearing, in banc, entered on November 21, 1963.

Opinions of the Courts Below

The Findings of Fact and Conclusions of Law and Supplemental Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of New York, Honorable Gregory F. Noonan, in favor of petitioner are unreported to date and are set out in the appendix to this petition at pages 11a to 18a.

The opinion of the United States Court of Appeals for the Second Circuit, reversing the Judgment of the

District Court is reported at 324 F. 2d 225 and is set out in the appendix to this petition at pages 1a to 6a.[1]

Denial of the Petitions for Rehearing and for Rehearing, in banc, are unreported to date and are set out in the appendix to this petition at pages 9a and 10a respectively.

Jurisdiction

This action, predicated upon the Jones Act, 46 U. S. C. § 688, was brought in the United States District Court for the Southern District of New York.

The Findings of Fact and Conclusions of Law and Supplmental Findings of Fact and Conclusions of Law and Judgment entered thereon were appealed from by the respondent.

The decision of the United States Court of Appeals for the Second Circuit, reversing the Judgment of the lower Court was filed on October 25, 1963. Orders denying the Petitions for Rehearing and for Rehearing, in banc, were entered on November 21, 1963.

The jurisdiction of this Honorable Court is invoked pursuant to 28 U. S. C. § 1254(1).

Statute Invoked

"§ 688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes

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[1] The original opinion of the Court of Appeals was changed on November 18, 1963 to more accurately reflect the Court of Appeals' affirmation of the District Court's finding.

The changes are noted as footnotes to the opinion in the appendix to this petition at pages 2a, 3a and in the letter from the Clerk of the Court of Appeals, dated November 18, 1963, set out in the appendix at page 7a.

of the United States modifying or extending the common-law right or remedy in case of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Statement of Facts

Following trial of the case, the trial Court, sitting without a jury, on the basis of a pre-trial stipulation of facts[2]

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[2] 3(a) * * *

(3) The defendant, American-Hawaiian Steamship Company, employed the plaintiff as a seaman in the capacity of a purser abroad the S.S. "Nevadan."

(4) On June 24, 1955, the plaintiff went ashore with Captain Shigley, Master of the S.S. "Nevadan" to conduct ship's business at the American Consul and the ship's agent.

(5) After going to the American Consul, the plaintiff and the captain started on their way to the ship's agent. Enroute, they entered a restaurant for the purpose of exchanging some currency and to have a cup of coffee. This was at noon. The first attempt to exchange the currency was refused and they left the restaurant. As they got to the street they were called back to the restaurant and were told the currency could be exchanged. They re-entered the restaurant and walked to a counter where they sat down and ordered coffee. The captain sat between the plaintiff and the door that they had entered. After exchanging the currency and finishing their coffee, they started to leave the premises in single file, with the captain walking immediately in front of the plaintiff. The captain passed a trap door in the floor of the restaurant which had been opened after they had entered the premises. The plaintiff, not seeing the open trap door, stepped into it.

by counsel and evidence introduced, drew the following Findings of Fact:

1. The Court has jurisdiction of the parties and the subject matter of this action.

2. The plaintiff is a citizen and resident of the State of Florida and at all the times herein was employed in the capacity of Purser aboard the S.S. "Nevadan" by the American-Hawaiian Steamship Company.

3. On June 24, 1955, plaintiff went ashore in the Port of Bordeaux, France, in the company of Captain Shigley, Master of the S.S. "Nevadan", to conduct ship's business at the office of the American Consul.

4. After going to the American Consul and attending to the business there, plaintiff and the captain started on their way to the office of the ship's agent. En route, they entered a restaurant for the purpose of exchanging some currency. The first attempt to change the currency was refused and they left the restaurant. As they got to the street, they were called back to the restaurant and were told that the currency could be exchanged. They re-entered the restaurant and walked to a counter where they sat down and ordered coffee. The captain sat between the plaintiff and the door that they had entered.

5. While they were seated at the counter, a trap door which was located approximately midways between where the captain and plaintiff were seated and the entrance door to the premises, was opened for the delivery of some merchandise.

6. Captain Shigley observed the opening of the trap door and observed that it remained open while they were still seated at the counter.

7. The plaintiff, Robert Trost, did not observe the opening of the trap door, nor was he told about it by the captain.

8. After exchanging the currency and finishing their coffee, they started to leave the premises in

single file with the captain walking immediately in front of the plaintiff. The plaintiff's vision was obscured by the body of the captain, who wore a homburg hat. The captain walked towards the open trap door with plaintiff immediately to his rear, and when he reached it he stepped aside and the plaintiff, who was following very closely behind the captain, fell into the open trap door.

9. The plaintiff was assisted out of the opening by the master and was subsequently taken by the master to the hospital for treatment.

10. The sole cause of this injury to the plaintiff was the negligence of the defendant through its master in failing to provide the plaintiff with a reasonably safe place wherein to work in that the captain failed to warn him of the dangerous condition caused by the open trap door visible to the captain but not to the plaintiff.

11. The plaintiff was not guilty of contributing to his own accident.

12. Plaintiff sustained personal injuries for which he is entitled to recover from the defendant.

The Court below accepted the findings of the trial Court[3]

Reasons For Granting the Writ

The majority[3] decision of the Court below stands as an unduly restrictive approach to the Jones Act, 46 U. S. C. § 688, remedial legislation enacted for the benefit and protection of seamen, *Cox* v. *Roth*, 348 U. S. 207; *Garrett* v. *Moore—McCormack*, 317 U. S. 239; *Socony-Vacuum* v. *Smith*, 305 U. S. 424; *Arizona* v. *Anelich*, 298 U. S. 110; *Warner* v. *Goltra*, 293 U. S. 155; *Jamison* v. *Encarnacion*, 281 U. S. 635; *Cortes* v. *Baltimore*, 287 U. S. 367.

The negation of all responsibility to the seaman-petitioner by the shipowner herein is more startling in view of

[3] Dissent by Circuit Judge Clark.

recent determinations extending that protection to periods when furtherance of ship's business required work to be performed ashore. The opinion of the Court below is calculated to effect a reversal of the oft stated intent to treat cases involving seamen on a broad humanitarian basis so as not to throw the burden of injury solely upon the injured. It is in direct conflict with numerous holdings of this Court and of the several Courts of Appeals.

The trial Court's decision established that the petitioner and the Master left the vessel in the course of their employment, in furtherance of ship's business, that the Master knew that a hazardous condition had been created where petitioner would walk, that the Master blocked the petitioner's vision so that the latter never knew of the opening and that the Master failed to warn petitioner of the hazard.

Since the Court of Appeals affirmed the findings of the trial Court, the opinion of the Court below that the petitioner's steps were "errant"[1], that petitioner was not reasonable in failing to "perceive" the opening, that the Master's failure was not an "element of (his) employment" was self-contradictory. Indeed, the Court below paid nothing more than lip service to the trial Court's findings as a necessity under the doctrine of *McAllister* v. *United States*, 348 U. S. 19, in couching its opinion in terms fashioned to reach a strikingly opposite conclusion. Petitioner was thus abandoned to his own devices to avoid an unknown danger at the very moment when he most desperately required consideration for his safety.

Its opinion predicated upon the premise that the "particular act performed negligently was (not) in the scope

[1] The question of contributory negligence is one of fact, *Bisso* v. *Miller*, 233 F. 2d 855 (5C); *Kennair* v. *Mississippi*, 197 F. 2d 605 (2C); *Greco* v. *Lorentzen*, 139 F. 2d 113 (2C); *Chesapeake* v. *Newman*, 243 F. 2d 804 (6C); *Lopoczyk* v. *Chester*, 152 F. 2d 457 (2C).

of employment * * * ", the Court, in reality, denied the existence of any duty owed by the shipowner to the petitioner in declaring the Master to be nothing more than a non-acting volunteer, without legal responsibility for failing to warn petitioner of the danger. This seems all the more shocking in view of the paternal responsibility of a Master, as the shipowner's agent, to safeguard his crew, *The Rolph*, 299 F. 52 (9C); *Jensen* v. *United States*, 184 F. 2d 72 (3C); *Spellman* v. *American*, 176 F. 2d 716 (3C); *Koehler* v. *Presque-Isle*, 141 F. 2d 490 (2C); *Potter* v. *Ohio*, 184 F. 2d 432 (3C); *Monteiro* v. *Paco*, 93 F. Supp. 93 (D. C. Pa.). As such the decision was not only factually contrary to the findings of the trial Court but, far more important, it created the setting for possible reinstitution of the common law defense of fellow-servant, felt by Congress to be contrary to and destructive of the rights of seamen to be indemnified when injured by the negligence of other crew members engaged in the course of employment, *DeZon* v. *American*, 318 U. S. 660; *Beadle* v. *Spencer*, 298 U. S. 124; *Johnson* v. *United States*, 333 U. S. 46; *Brown* v. *Mallory*, 122 F. 2d 98 (3C); *Becker* v. *Waterman*, 179 F. 2d 713 (2C).

(a) The duty to provide a safe place to work.

The gravamen of the Jones Act being negligence, *DeZon* v. *American*, 318 U. S. 660, the standard of care resting upon the shipowner is to use reasonable care to provide the crew with a safe place to work.[5] *Beadle* v. *Spencer*, 298 U. S. 124; *Mahnich* v. *Southern*, 321 U. S. 96; *Rey* v. *Colonial*, 116 F. 2d 580 (2C); *Johnson* v. *Griffiths*, 150 F.

[5] Whether the shipowner failed to furnish the injured plaintiff-seaman with a safe place to work is an issue of fact, *Beadle* v. *Spencer*, 298 U. S. 124; *Salem* v. *United*, 370 U. S. 31; *Bisso* v. *Miller*, 233 F. 2d 855 (5C); *Anderson* v. *Continental*, 218 F. 2d 84 (2C); *Carr* v. *Standard*, 181 F. 2d 15 (2C); *Cerva* v. *Isbrandtsen*, 178 F. 2d 919 (2C); *Pariser* v. *City*, 146 F. 2d 431 (2C); *Gardiner* v. *New York*, 146 F. 2d 420 (2C); *Hanson* v. *Luckenbach*, 65 F. 2d 457 (2C); *Zinnel* v. *United States*, 10 F. 2d 47 (2C).

2d 224 (9C); *Interocean* v. *Topolofsky*, 165 F. 2d 783 (6C); *Sadler* v. *Pennsylvania*, 159 F. 2d 784 (4C); *Cleveland* v. *Martini*, 96 F. 2d 632 (6C); *Sanford* v. *Caswell*, 209 F. 2d 830 (5C). See also: *Kreigh* v. *Westinghouse*, 214 U. S. 249; *Sante* v. *Holmes*, 202 U. S. 438; *Hough* v. *Railway*, 100 U. S. 213, for similar responsibility placed upon railroad employers.

(b) The duty to warn.

The duty of the Master to warn of dangers known to him but not open and apparent to the employee when acting in furtherance of shipowner's business has always been the settled rule on the shipowner's vessel and is true on land as well, as an integral part of the duty to provide a safe place to work.

In *Davis* v. *Parkhill*, 302 F. 2d 489 (5C), the shipowner was held liable for the failure of the Captain or officers to warn a seaman of the dangerous conditions to be met in the performance of his duties. The Court affirmed the applicability of the principle of the duty to warn of a danger not reasonably known to the worker, as follows:

> "This is but the application of the familiar principle of salt water, amphibious and land-locked jurisprudence that there is a duty to warn in an effective way of dangers not reasonably known, Pioneer Steamship Co. v. Hill, 6 Cir., 1955, 227 F. 2d 262, 264, 1955 A. M. C. 1617, and a duty to take effective action in the light of the particular condition—here inexperience and ignorance of seagoing perils—of the particular seaman, Justillian v. Versaggi, S. D. Tex., 1954, 169 F. Supp. 71; Reck v. Pacific-Atlantic Steamship Co., 2 Cir., 1950, 180 F. 2d. 866, 1950 A. M. C. 744; McDonough v. Buckeye, S. S. Co., N. D. Ohio, 1951, 103 F. Supp. 473, affirmed 6 Cir., 1952, 200 F. 2d. 558; Tetterton v. Artic, Tankers, Inc., E. D. Pa. 1958, 116 F. Supp. 429" (p. 494).

In like manner, *Pioneer* v. *Hill*, 227 F. 2d 262 (6C), where an independent contractor cut a hole in the ship's

deck, known to the shipowner but not to the seaman, the owner's liability to the seaman was predicated upon "the duty of exercising reasonable care for his safety * * * and that this duty was violated when the shipkeeper failed to warn the (worker), orally or otherwise, of the existence of the hole in the * * * deck" (p. 263).

Southern v. *Firipis*, 285 F. 2d 651 (4C), affirming the lower Court decision, 181 F. Supp. 48, where the plaintiff was ordered to work in an area where the officers knew or should have known of the presence of oil, predicated liability upon the failure to warn the seaman of the unsafe condition.

The Norland, 101 F. 2d 967 (9C) affirmed liability for an open hatchway, absent knowledge by the crewman (or that a prudent man would have observed the opening), the danger known to the officer of the vessel.

See also: *Palazzolo* v. *Pan-Atlantic*, 211 F. 2d 277 (2C), aff'd 349 U. S. 901; *Cahill* v. *New York*, 350 U. S. 898, reversing 224 F. 2d 637; *Atlantic* v. *Gunter*, 229 F. 2d 842 (5C); *Guerrini* v. *United States*, 167 F. 2d 352 (2C); *Fodera* v. *Booth*, 159 F. 2d 795 (2C); *Kunschman* v. *United States*, 54 F. 2d 987 (2C); *Pontin Brothers*, 47 F. 2d 595 (2C); *Justillian* v. *Versaggi*, 169 F. Supp. 71 (D. C. Tex.); *The Emmy*, 55 F. Supp. 60 (D. C. N. Y.); *Dervishoglu* v. *Bogazides*, 44 F. Supp. 385 (D. C. N. Y.).

The fact that the respondent did not control the premises where the injury occurred was not significant. In *Gutierrez* v. *Waterman*, 373 U. S. 206, a longshoreman slipped on loose beans which had spilled from torn bags on to the dock where was working. Liability was predicated on the owner permitting the beans to be unloaded in defective bagging when the shipowner knew or should have known of the risk of injury to persons because of the spillage.

Negating the requirement of control over the premises, urt stated:

> "• • • control of the impact zone is not essential for negligence • • • Respondent (shipowner) allowed the cargo to be discharged in dangerous and defective bagging, from which beans were leaking before discharge of the cargo began. It had an absolute and nondelegable duty of care toward petitioner not to create this risk to him, which it failed to meet. When this lack of care culminated in petitioner's injury, respondent became legally liable to compensate him for the harm."

Thus, the actual knowledge of the defective condition created a risk of the continuation of the activity, a risk of injury which the shipowner had "an absolute and nondelegable duty of care • • • not to create • • • which it failed to meet".

In the case at bar, a similar risk of injury in working in an unsafe place was created when the Master saw the opening and failed to warn the petitioner of it.

The recent Supreme Court decision in *Shenker* v. *Baltimore*, 374 U. S. 1, further pinpointed the duty of the employer to inspect and warn of defective or dangerous conditions, even in areas not under its control. In the *Shenker* case, a defective train car door owned by another railroad injured the employee. The Court, affirming the employer's duty to inspect other premises where its employees would work, outlined that affirmative responsibility upon an employer to provide safety to its employee—regardless of ownership or control of premises.

> "• • • the trial judge relied on a series of court of appeals decisions standing for the more broad proposition that a railroad has the nondelegable duty to provide its employees with a safe place to work even when they are required to go onto the premises of a third party over which the railroad has no control. See Kooker v. Pittsburgh & Lake Erie R. Co.,

258 F. 2d 876; Chicago Great Western R. Co. v. Casura, 234 F. 2d 441; Beatti v. Elgin J. & E. R. Co., 217 F. 2d 863. These decisions are in accord with the opinions of this Court in Bailey v. Central Vermont R. Co., Inc., 319 U. S. 350; Ellis v. Union Pac. R. Co., 329 U. S. 649; Harris v. Pennsylvania R. Co., 361 U. S. 15, reversing 168 Ohio St. 582, 156 N. E. 2d 822. The present case has been argued to us on the basis of these same decisions and the safe-place-to-work doctrine. The respondent admits the general statements of the doctrine in these cases".

* * *

"In *Baltimore & Potomac R. Co.* v. *Mackey*, 157 U. S. 72, an employee of the Baltimore & Potomac was killed when a defective brake did not hold on a freight car hauled by the Baltimore & Potomac but belonging to another railroad. Relying on the language of an earlier New York decision, *Gottlieb* v. *New York & Lake Erie R. Co.*, 100 N. Y. 462, 467, the Court concluded that a railroad '* * * is bound to inspect foreign cars just as it would inspect its own cars. It owes the duty of inspection as a master * * *. When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects or refuse to take such cars; so much at least is due from it to its employees. 157 U. S., at 90.'" (pp. 7-8).

Interestingly, the dissent opinion by Mr. Justice Goldberg supports petitioner's position in stating that lack of evidence showing actual knowledge of the defect would result in a judgment for the employer. That evidence was not lacking herein.

"Normally, in a case such as this in which the defendant's own negligence did not create the hazardous condition, actual or constructive notice to the defendant of the injury producing defect is a prerequisite to negligence and, therefore, to liability. See, e.g., Sano v. Pennsylvania R. Co., 282 F. 2d 936, 938; Dobson v. Grand Trunk W. R. Co., 248 F. 2d 545, 548; Atlantic C. L. R. Co. v. Collins, 235 F. 2d 805, 808, cert. denied 352 U. S. 942; Kaminski v.

> Chicago, R. & I. R. Co., 200 F. 2d, 1, 4. See also Ringhiser v. Chesapeake & O R. Co., 354 U. S. 901; Wetherbee v. Elgin J. & E. R. Co., 191 F. 2d 302, subsequent appeal reported in 204 F. 2d 765, cert. denied, 346 U. S. 867. Thus, given the failure of the petitioner to introduce evidence tending to show that the respondent B & O knew, or in the exercise of reasonable care, should have known, of the defective door, the judgment entered below in favor of the B & O should be sustained" (pp. 11-12).

Kaminski v. *Chicago*, 200 F. 2d 1, involved an employee checking a railroad car off premises who fell into a hole alongside the tracks. Liability was denied on the basis of lack of actual notice to the railroad employer. The Court, however, stated that there was the duty to furnish a safe place to work, even without control of the premises, as follows:

> "Before defendant can be charged with negligence in failing to remedy the condition which caused plaintiff's injury, or failed to warn plaintiff of the existence of such a condition, it is necessary to establish that the defendant had actual knowledge of the condition, or, in the exercise of ordinary care, should have known of its existence" (4).

See also: *Ellis* v. *Union*, 329 U. S. 649 and *Bailey* v. *Central*, 319 U. S. 350, in which failure to warn an inexperienced worker of insufficient space to work or of a known danger was held to present a jury question; *Holley* v. *Manfred*, 269 F. 2d 317, which held that actual knowledge by the shipowner of the improper stowage condition was sufficient to give rise to liability; *Union* v. *Stapleton*, 237 F. 2d 229, in which failure to inform an employee that he had tuberculosis, known to the employer, gave rise to liability; *McAllister* v. *Cosmopolitan*, 169 F. 2d 4, rev'd on other grounds, 337 U. S. 783, which held that permitting Chinese to come aboard and to mingle with the crew with knowledge of an epidemic on shore gave rise to liability; *Vanderlinden* v. *Lorentzen*, 139 F. 2d 995 (2C), affirming

the duty of a shipowner to warn of the dangerous condition known to it but not the business invitee, even absent control over the vessel by the owner. *Northwestern* v. *Danielson*, 57 F. 915, in which a failure to warn of a defective condition created by the defendant resulted in employer liability; *Robert* v. *United States*, 240 N. Y. 474, where a seaman was ordered to work in a dangerous place off the ship, known to involve a risk; *Bailey* v. *Rome*, 139 N. Y. 302, involving actual knowledge of a defect, giving rise to liability.

Under negligence principles, to hold the shipowner liable, it must have either actual or constructive notice of the defect or danger with reasonable time to repair or warn. The control of premises might well establish constructive notice of a situation if proved to exist for sufficient time. However, as in the case at bar, evidence of actual notice rendered immaterial any issue of control. The shipowner's duty to provide a safe place to work, the seaman acting in the course of employment, and the failure to warn of the danger known to the Master properly spelled out the elements of shipowner's liability herein.

(c) Course of employment.

As stated, petitioner and his Master left the vessel in furtherance of ship's business, which work was not concluded at the time of the accident. The restaurant was entered at the Master's direction to change currency for the taxi ride to the ship's agent. As found by both the trial and appellate Courts, petitioner was still in the course of his employment. The unfathomable conclusion drawn by the Court of Appeals that the Master had somehow left his employment, which negated his duty toward petitioner, after placing petitioner (without malice) in a position of danger at the very moment that he had the duty to safeguard petitioner was left unexplained.

When the seaman was "acting in the course of employment" was given liberal construction in favor of bringing the injured within the scope of ship's business in *Jamison* v. *Encarnacion*, 281 U. S. 635; *Alpha* v. *Cain*, 281 U. S. 642; *Nelson* v. *American*, 86 F. 2d 730 (2C); *Brailas* v. *Shepard*, 152 F. 2d 849 (2C).

Anderson v. *Chamberlin*, 298 P. 2d 901, 142 C. A. 2d 591, involved issues of "course of employment and ship's duty." The Court laid down the principles of law to be applied as follows:

> "• • • a seaman is at his place of work when he is at a place on or off the ship for a purpose 'connected with [his] employment' by the shipowner, *States S.S. Co.* v. *Berglann*, 9 Cir. 41 F. 2d 456, 457" (p. 913).

The Court further stated that there could be recovery if the injured seaman was acting in the vessel's interest, citing *Wong* v. *Suburban*, 119 F. 2d 745 (2C); *Nowery* v. *Smith*, 69 F. Supp. 755, aff'd 161 F. 2d 732 (3C); *Pedersen* v. *United States*, 122 F. Supp. 614, aff'd 224 F. 2d 212 (2C), that there could be recovery if he was at a place to do something connected with and in aid of the task assigned to him, citing *Seas* v. *Sieracki*, 328 U. S. 85; *Thompson* v. *Eagle*, 182 F. 2d 717 (4C); *Bodalamenti* v. *United States*, 160 F. 2d 422 (2C), or if engaged in any matter incidental to his required duties, *Sundberg* v. *Washington*, 138 F. 2d 801 (9C).

As to the continuing duty to safeguard the seaman, the Court stated:

> "• • • a ship's employee is entitled to a safe place to work when he leaves the spot where his primary task is performed to do something connected with and in aide of that task • • •" (p. 913).

The recent case of *Carney* v. *Pittsburgh*, 316 F. 2d 277 (3C), involving a railroad worker injured in a Y.M.C.A.

due to the negligence of its employees, held that the railroad employer, paying for the plaintiff's room, had the duty to maintain the facility into which the plaintiff was sent. The Court declared that since the Y.M.C.A.'s supply of lodging to the plaintiff was performed within the "operational activities" of the railroad under agency principles and the plaintiff was in the course of his employment, citing *Mostyn* v. *Delaware*, 160 F. 2d 15 (2C); *Casso* v. *Pennsylvania*, 219 F. 2d 303 (3C) and *Sinkler* v. *Missouri*, 356 U. S. 326, plaintiff's injuries caused by the negligent activities of an agent of the employer sustained while furthering the employer's business would give rise to employer liability.

Similarly, the wrongdoer has been held to be within the scope of his employment when acting outside the strict range of his duties as an incident to their completion. In *Civil* v. *Waterman*, 217 F. 2d 94 (2C), the shipowner was held liable for a shipboard stabbing resulting from acts of discipline carried out by officers discharging their duties in furtherance of the owner's business.

Jensen v. *United States*, 184 F. 2d 72 (3C), predicated liability upon the failure of the Master and officers to see to the safety of the crew in encouraging a fight between crewmen to settle an argument, the plaintiff hurt trying to stop the use of a knife by one of the participants.

Suhdberg v. *Washington*, 138 F. 2d 801 (9C), involved a seaman aboard ship shot by a fellow crewman firing at sea lions, the activity known to the Captain who failed to stop the sport. Reversing a dismissal by the trial Court, the Court of Appeals stated that proof of negligence would be met by "showing that under existing circumstances the shipowner or his agents should reasonably have anticipated the danger of bodily injury to a member of the crew" (p. 803). The Court further declared that the Jones Act was to be liberally construed in favor of the seaman as remedial legislation, citing *Armit* v. *Loveland*, 115 F. 2d

308 (3C); *Pittsburgh* v. *Palo*, 64 F. 2d 198 (6C) and *Storgard* v. *France*, 263 F. 545 (2C).

See also: *Stratton* v. *United States*, 8 F. Supp. 429 (D. C. N. Y.); *Holm* v. *Cities*, 60 F. 2d 721 (2C); *States* v. *Berglann*, 41 F. 2d 456 (9C) and *McKie* v. *Diamond*, 204 F. 2d 132 (5C).

This Court has discussed this very point in *O'Donnell* v. *Great Lakes*, 318 U. S. 36; *Senko* v. *LaCrosse*, 352 U. S. 370 and *Braen* v. *Pfeifer*, 361 U. S. 129, cases involving shoreside and off ship injuries where the plaintiff-seamen were ordered to work and sustained injury by fellow-servant negligence or by an unsafe condition. This Court, affirming the duty of the shipowner to provide a safe place to work away from the vessel, stated that the statutory language "in the course of employment" was broadly interpreted by Congress in enacting the Jones Act and held that the plaintiffs in the cases had suffered their injuries in the course of their employment since they were doing the work for their employer pursuant to employers' orders (Braen). The Court declared that in determining jurisdiction, the place of injury was immaterial (Senko), the answer resting on the nature of the service and its relationship to the operation of the vessel plying in navigable waters (O'Donnell).

It would seem, assuming an injury incurred during the course of employment, that all distinction between harm sustained aboard ship and on land have been swept away as regards the issue of Jones Act jurisdiction and the resultant rights and responsibilities of those engaged in the calling of the sea.

See also: *Gutierrez* v. *Waterman*, 373 U. S. 206; *Marceau* v. *Great Lakes*, 146 F. 2d 416 (2C); *Wong* v. *Suburban*, 119 F. 2d 745 (2C); *Buckeye* v. *McDonough*, 200 F. 2d 558 (6C), affirming 103 F. Supp. 473.

(d) Derivative liability.

Shipowner's derivative liability for the Master's negligence seems well established. Again, the Court below attempted to limit the liberal legislative concept of the Jones Act by improperly narrowing shipowner's liability to those cases where the shipowner had specifically ordered the negligent employee to perform the particular service. Thus—the shipowner's simple denial that the "particular act performed negligently was within the scope of employment of the negligent employee" may now take on the force of law in order to deny to seamen all of their rights universally acknowledged to be due them. The concept created for the first time by the Court below seems to be directly opposed to this Court's decision in *DeZon* v. *American*, 318 U. S. 660, where the act of negligence complained of, for which the shipowner was held liable, was that of the ship's doctor in his method of treating the injured plaintiff. There was, quite obviously, no consent by the shipowner to the method or manner of treatment or mal-treatment by the physician. Liability was predicated upon the fact that the doctor was acting in furtherance of ship's business.

See also: *Brailas* v. *Shepard*, 152 F. 2d 849 (2C); *Lykes* v. *Grubaugh*, 128 F. 2d 387 (5C), modified on other grounds 130 F. 2d 25; *Stevens* v. *O'Brien*, 62 F. 2d 632 (1C) and *Mitchell* v. *Wingard*, 323 P. 2d 908, 52 Wash. 2d 121.

In *Kyriakos* v. *Gaylandris*, 151 F. 2d 132 (2C), involving a seaman, stabbed by a fellow seaman known by the Master to be brutal, Judge Learned Hand, dissenting on other grounds, stated that derivative liability of the shipowner for the Master's negligence was proper when the negligent act "falls within the internal economy or discipline of the ship" (p. 140).

In summary—the decision of the Court below has established a restrictive concept of the Jones Act which promises to destroy the rights of seamen injured by the negligent acts of their Master. It seems clear that the test of

whether the wrongdoer was in the "course of employment" as laid down by this Court in *DeZon* v. *American*, *supra*, as well as in the decisions of the several Courts of Appeals in *Carney* v. *Pittsburgh* and *Jensen* v. *United States*, *supra* (Third Circuit), *Civil* v. *Waterman* and *Kyriakos* v. *Goulandris*, *supra* (Second Circuit) and *Sundberg* v. *Washington*, *supra* (Ninth Circuit) has been seriously altered in limiting the shipowner's responsibility toward the seaman to provide a safe place to work.

The Court below would emasculate the statutory and decisional rights granted to seamen by creating a setting which would permit a return of the discredited common law theory of fellow-servant defense. Derivative liability would be restricted to those infrequent situations where the shipowner has given *express* authorization to the wrongdoer to perform the *particular* act for which recovery is sought rather than upon the settled, accepted rule of employer responsibility for acts conducted within the operational activities of the employer (Carney), within the internal economy or discipline of the ship (Kyriakos), in furtherance of ship's business (DeZon).

The destruction of such basic rights should not remain as a cancer in the long settled rule establishing the duty of the shipowner to provide those engaged in the hazardous maritime calling with safe conditions under which to pursue their trade, whether on land or at sea, nor should this Court entertain a concept of shipowner liability dependent solely upon shipowner's confession of authorization of a "particular act negligently performed."

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: February 18, 1964.

Respectfully submitted,

GOLDSTEIN & STERNFELD,
Counsel for Petitioner,
32 Broadway,
New York 4, New York.

HARVEY GOLDSTEIN,
on the Petition.

APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Argued October 10, 1963 Decided October 25, 1963)

Docket No. 28231

ROBERT F. FROST,

Plaintiff-Appellee,

v.

AMERICAN HAWAIIAN STEAMSHIP COMPANY,

Defendant-Appellant.

CLARK, MOORE and KAUFMAN,

Circuit Judges.

Plaintiff brought an action for negligence under the Jones Act, 46 U. S. C. § 688, in the United States District Court for the Southern District of New York. After trial before Gregory F. Noonan, *J.*, without a jury, he recovered a judgment for $17,410.86 and costs, from which defendant appeals.

Judgment reversed.

GRAY WILLIAMS, New York, N. Y. (Boal, McQuade & Fitzpatrick, on the brief), *for appellant.*

Opinion of United States Court of Appeals for the Second Circuit

HARVEY GOLDSTEIN, New York, N. Y. (HERBERT W. STERENFELD, on the brief), *for appellee.*

KAUFMAN, *Circuit Judge:*

The defendant steamship company appeals from a judgment for $17,410.86 and costs, recovered by the plaintiff after a trial before a judge sitting without a jury. Plaintiff suffered injuries while in a shoreside cafe, over four miles from his ship, allegedly as a result of the negligent failure of the ship's captain to warn him of the existence of an open trap-door through which he fell. On appeal, defendant contends that the District Court's holdings of negligence and derivative liability were unjustified. Our jurisdiction is based on the Jones Act, 46 U. S. C. § 688.

At the time of the accident, plaintiff was forty-five years of age and the purser of defendant's SS. Nevadan. In June of 1955, while the ship was moored to a pier in Bordeaux, France, the plaintiff went ashore with the captain to transact ship's business at the American Consulate and at the office of the ship's agent. After completing their business at the American Consulate and while en route to the office of the ship's agent the captain and the plaintiff decided to stop at a cafe to exchange currency and have some coffee.* They had their coffee at a counter, the captain sitting between the plaintiff and the front door of the cafe. While they were so seated, some workmen entered the cafe to deliver produce and, in doing so, opened a trap-door in the cafe floor at the end of the counter, approximately fifteen feet from where the captain and the purser were seated. Although the opening in the floor was about five feet in length,** it was the plaintiff's contention that he was

* The original sentence was: After completing their business, the captain and the plaintiff decided to stop at a cafe to purchase currency and have some coffee.

** Originally the word "width".

unaware of it. When they had finished their coffee, the captain and the plaintiff walked out of the cafe in single file, with the captain leading the way. The captain was five feet, nine inches tall and the plaintiff five inches taller, but the plaintiff maintained that he was unable to see over the captain's shoulder. Plaintiff further asserted that the captain stepped aside just before reaching the trap-door to avoid the fall, but that he proceeded straight ahead and fell into the opening, suffering his injuries.

In separately stated findings of fact and conclusions of law, the trial judge found that the captain's negligence was the sole cause of the accident. He expressly found that the trap-door was visible to the captain and not to the plaintiff, and hence concluded that the plaintiff was not contributorily negligent; he went on to hold that the captain was negligent in failing to call the opening to the plaintiff's attention. Finding that the injury occurred while the plaintiff was "in the course of his employment," he concluded that the Jones Act was applicable, and that the captain's negligence could be attributed to the defendant shipowner. Although we do not challenge any of his specific findings of fact, we disagree with his conclusions of both negligence and derivative liability, and we therefore reverse the judgment below.

The holding of negligence seems particularly vulnerable. It is hornbook law that before we may find the captain negligent, we would have to hold that he was under a duty to warn the plaintiff of any "hazards" which lay underfoot in the cafe. We cannot see how, in the light of the facts present here, we could so hold.

The plaintiff, as we have already indicated, was a mature officer of forty-five. We know of no principle of law which dictates that a captain is under a constant obligation to see that such a subordinate officer looks where he is going when walking on shore in a public place and some distance from the ship. The "hazard" in this case,

moreover, was a trap-door with an opening about five feet long,*** and not a hidden or minute crevice; it does not seem unreasonable to expect that the plaintiff will himself be alert to this sort of "hazard," and not rely upon his captain to act as a nautical seeing-eye dog.

Without belaboring the point, several cases in this circuit have held that a shipowner is under no duty to warn his seamen of "hazards" which they might reasonably be expected to perceive for themselves. See *Farrell* v. *United States*, 167 F. 2d 781, 783 (2nd Cir. 1948), *aff'd*, 336 U. S. 511 (1949); *Dangovitch* v. *Isthmian Lines, Inc.*, 218 F. Supp. 235 (S. D. N. Y. 1963); *Wheeler* v. *West India Steamship Co.*, 103 F. Supp. 631 (S. D. N. Y. 1951), *aff'd per curiam*, 205 F. 2d 354 (2nd Cir.), *cert. denied*, 346 U. S. 889 (1953). In all of these cases, moreover, the dangers appeared to lie in close proximity to the ship. Since, as we have already emphasized, the accident in the present case occurred in a public restaurant more than four miles away, it would be totally unwarranted in the light of these earlier decisions to fasten liability upon the shipowner here.

But even if we were to affirm the holding of negligence, we do not see how we could hold the shipowner responsible. This is not to suggest that we have any quarrel with the District Court's holding that the plaintiff was injured while in the scope of his employment. In *Braen* v. *Pfeifer Transportation Co.*, 361 U. S. 129, 133-34 (1959), the Supreme Court held that "course of employment," as it is used in the Jones Act, is equivalent in meaning to "the service of the ship," as it has been defined in seamen's actions for maintenance and cure. And this latter phrase has admittedly been very broadly defined. In *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724 (1943), maintenance and cure were awarded to a seaman who was injured while on shore leave; in *Warren* v. *United States*, 340 U. S. 523 (1951), a seaman

*** Originally the word "wide".

was deemed "in the service of the ship" while cavorting in a shoreside dance hall.

We are thus willing to accept the fact that the plaintiff was "in the course of his employment" as he walked towards the fateful opening in the cafe floor. Our objection is to the implicit finding—necessary if the shipowner is to be held liable—that the failure of the captain to call the opening to the plaintiff's attention was within the scope of *his* (the captain's) employment.

For even if human beings in general have a legal, as well as ethical obligation to abide by the Sermon on the Mount and to look out for one another, *but see* Restatement of Torts § 314, it hardly would seem to be part of the function of a captain to ensure that his officers are aware of apparently visible obstacles on shore while miles from the ship. It appears, therefore, that the fact that the captain and the purser were "in the course of their employment" in terms of time and place, is not sufficient; a shipowner may not be held liable unless the particular act performed negligently was also in the scope of employment of the negligent employee. We do not consider it an element of the captain's employment to be on guard for the errant footsteps of his land-based purser and thereby to impose derivative liability on the ship.

While not squarely in point factually, several decisions of this court seem relevant. In *Robinson* v. *Northeastern Steamship Corp.*, 228 F. 2d 679 (2nd Cir.), *cert. denied*, 351 U. S. 937 (1956), the administratrix of a seaman killed while returning from shore leave was denied Jones Act recovery. The decedent was apparently intoxicated at the time of the accident, and was being helped back to his ship by a fellow seaman. Although willing to assume that the assisting seaman was negligent and that the plaintiff's decedent was killed while in the course of *his* employment, this court refused to hold the shipowner responsible. Rather, we held in *Robinson* that the particular act performed negligently, aiding an intoxicated seaman to return

to his ship, was not within the scope of the negligent seaman's employment. See also *Thurnau* v. *Alcoa Steamship Co.*, 229 F. 2d 73 (2nd Cir.), *cert. denied*, 351 U. S. 925 (1956).

We find it unnecessary to reach the question whether the Jones Act may be applied to accidents occurring considerable distances from the ship in public places on shore which are in no respect under the control of the shipowner. Here, we find neither negligence nor a foundation for derivative liability.

The judgment is reversed.

CLARK, *Circuit Judge* (dissenting):

As the trial judge found, when the captain and the purser sat down at the lunch counter, the "captain sat between the plaintiff and the door that they had entered." So after the trap door was opened midway between them and the entrance door—an occurrence which the captain observed and the plaintiff did not—they started to leave, with the captain walking immediately in front of the plaintiff. "The plaintiff's vision was obscured by the body of the captain, who wore a homburg hat." The open trap door was "visible to the captain but not to the plaintiff." It is thus quite clear that the captain was fully apprised of the dangerous condition caused by the open trap door, and that the plaintiff had no knowledge of it, as was natural under the sequence of events I have just noted.

Under the circumstances it seems passing strange that the captain, who could see all this, did not do the human thing of even saying, "Look out" or "Watch your step." We do not need to resort to the traditional view that seamen are wards of admiralty or even rely on the Jones Act to see with the trial judge that the captain was guilty of rather gross negligence. Since they were on the ship's business and since there is no question of contributory negligence, the moderate award made the plaintiff should stand.

Letter, Dated November 18, 1963

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

United States Courthouse
Foley Square
New York 7

A. DANIEL FUSARO
Clerk

November 18, 1963

Robert F. Trost v. American Hawaiian Steamship Co.

Docket No. 28231 Decided October 25, 1963

In Judge Kaufman's opinion in the above entitled case, the following changes have been made:

Page 70—13th line from bottom—after "business" delete "comma" and insert "at the American consulate and while en route to the office of the ship's agent"

Page 70—5th line from bottom—delete "width," and insert in place thereof "length,"

Page 72—1st line—delete "wide," and insert in place thereof "long,".

A. DANIEL FUSARO
Clerk

mw

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of October one thousand nine hundred and sixty-three.

Present:

HON. CHARLES E. CLARK,
HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

ROBERT F. TROST,
Plaintiff-Appellee,

v.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (Delaware),
Defendant.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court by and it hereby is reversed in accordance with the opinion of this court with costs to the appellant.

/s/ A. DANIEL FUSARO,
Clerk.

Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ROBERT F. TROST,

Plaintiff-Appellee,

v.

AMERICAN HAWAIIAN STEAMSHIP COMPANY,

Defendant-Appellant.

GOLDSTEIN & STERENFELD, New York, N.Y., for plaintiff-appellee.

Petition for rehearing is denied.

L. P. M.
I. R. K.
U. S. C. J.J.

I dissent and vote to grant.

C. E. C.
U. S. C. J.

Nov 21 1963

Petition for Rehearing in Banc

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT F. TROST,
Plaintiff-Appellee,

v.

AMERICAN HAWAIIAN STEAMSHIP COMPANY,
Defendant-Appellant.

GOLDSTEIN & STERENFELD, New York, N. Y., for plaintiff-appellee.

All of the active judges concurring, except Judge Clark who votes to grant, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

21 November 1963

Findings of Fact and Conclusions of Law of United States District Court for the Southern District of New York

(126)

NOONAN, D. J.:

This action was tried before the Court on December 14, 1962, under the provisions of Rule 42(b) of the Federal Rules of Civil Procedure which provide:

> "(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim or third party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

Accordingly, the sole issue before this court at the present time is the question of liability. After a careful study of the facts and exhibits the court makes the following findings.

(127)

FINDINGS OF FACT

1. The Court has jurisdiction of the parties and the subject matter of this action.

2. The plaintiff is a citizen and resident of the State of Florida and at all the times herein was employed in the capacity of Purser aboard the S.S. "Nevadan" by the American-Hawaiian Steamship Company.

3. On June 24, 1955, plaintiff went ashore in the Port of Bordeaux, France, in the company of Captain Shigley, master of the S.S. "Nevadan", to conduct ship's business at the office of the American Consul.

Findings of Fact and Conclusions of Law of United States District Court for the Southern District of New York.

4. After going to the American Consul and attending to the business there, plaintiff and the captain started on their way to the office of the ship's agent. En route, they entered a restaurant for the purpose of exchanging some currency. The first attempt to change the currency was refused and they left the restaurant. As they got to the street, they were called back to the restaurant and were told that the currency could be exchanged. They reentered the restaurant and walked to a counter where they sat down and ordered coffee. The captain sat between the plaintiff and the door that they had entered.

5. While they were seated at the counter, a trap door which was located approximately midway between (128) where the captain and plaintiff were seated and the entrance door to the premises, was opened for the delivery of some merchandise.

6. Captain Shipley observed the opening of the trap door and observed that it remained open while they were still seated at the counter.

7. The plaintiff, Robert Trost, did not observe the opening of the trap door, nor was he told about it by the captain.

8. After exchanging the currency and finishing their coffee, they started to leave the premises in single file with the captain walking immediately in front of the plaintiff. The plaintiff's vision was obscured by the body of the captain, who wore a homburg hat. The captain walked towards the open trap door with plaintiff immediately to his rear, and when he reached it he stepped aside and plaintiff, who was following very closely behind the captain, fell into the open trap door.

9. The plaintiff was assisted out of the opening by the master and was subsequently taken by the master to the hospital for treatment.

10. The sole cause of this injury to the plaintiff was the negligence of the defendant through its master in (129) failing to provide the plaintiff with a reasonably safe place wherein to work in that the captain failed to warn him of the dangerous condition caused by the open trap door visible to the captain but not to the plaintiff.

11. The plaintiff was not guilty of contributing to his own accident.

12. Plaintiff sustained personal injuries for which he is entitled to recover from the defendant.

CONCLUSIONS OF LAW

1. The first question which this Court must consider is whether the rights granted to seamen under the Jones Act, 46 U. S. C. A. 688 are applicable to the plaintiff in light of the facts expressed above, namely, the accident occurring on shore some distance from the ship.

There is no disagreement between the parties that the plaintiff here was a seaman performing duties within that traditional concept. Thus his "status as a member of the vessel" is established. See *Swanson* v. *Marra Bros.*, 328 U. S. 1.

While on shore in Bordeaux, France, this court finds that the plaintiff was carrying out the business of the ship. In accompanying the captain to the agent's office and to the consular office, he was acting in the course of his employment.

Findings of Fact and Conclusions of Law of United States District Court for the Southern District of New York

(130) In *Braen* v. *Pfeifer Transportation Co.*, 361 U. S. 129, the Supreme Court held, at page 131:

> "The test, as the O'Donnell case holds, is not whether the injury occurred on navigable waters, for that had been applied by the lower court, id., at 53, which we reversed. Rather it is whether the seaman was injured by negligence while 'in the course of his employment.'"

The court also held at page 133:

> "Petitioner was acting 'in the course of his employment' at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders. No more is required by the Jones Act, as the O'Donnell case indicates, petitioner being a seaman who was injured as a consequence of the negligence of his employer."

This court, therefore, holds the provisions of the Jones Act to apply in this case, and the court has jurisdiction of the subject matter and of the parties to this suit. *O'Donnell* v. *Great Lakes*, 318 U. S. 36; *Marceau* v. *Great Lakes*, 146 F. 2d 416; *Buckeye* v. *McDonough*, 200 F. 2d 558.

2. The defendant had a non-delegable duty to provide the plaintiff with a reasonably safe place wherein to work. *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96; *Beadle* v. *Spencer*, 298 U. S. 124; *Rey* v. *Colonial Nav. Co.*, 116 F. 2d 580; *Johnson* v. *Griffiths S. So. Co.*, 150 F. 2d 224; *Interocean S.S. Co.* v. *Toplofsky*, 165 F. 2d 783.

(131) 3. The defendant, through its master, had actual notice of the open trap door and the failure of the captain to warn the plaintiff thereof constituted negligence.

Findings of Fact and Conclusions of Law of United States District Court for the Southern District of New York

O'Donnell v. *Great Lakes*, 318 U. S. 36; *Marceau* v. *Great Lakes*, 146 F. 2d 416; *Buckeye* v. *McDonough*, 200 F. 2d 558.

4. The negligence of the defendant was the sole cause of plaintiff's accident.

5. The plaintiff was not guilty of any contributory negligence. *Guerrini* v. *United States*, 167 F. 2d 352, cert. denied 335 U. S. 843.

6. The defendant, American-Hawaiian Steamship Company, is, therefore, held liable to this plaintiff for the injuries which he sustained. A hearing as to the question of damages will be held at a date to be fixed.

Submit order.

GREGORY F. NOONAN,
U. S. D. J.

Dated, New York, N. Y., January 11, 1963.

Supplemental Findings of Fact and Conclusions of Law of United States District Court for the Southern District of New York

(113)

NOONAN, D. J.

This action was tried before the court on December 14, 1962, under the provisions of Rule 42(b) of the Federal Rules of Civil Procedure which provide:

> "(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim or third party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third party claims or issues."

On January 11, 1963 this court filed its Findings of Fact and Conclusions of Law holding the defendant, American-Hawaiian Steamship Company, liable for the injuries sustained by the plaintiff. On February 1, 1963, the court (114) held a hearing on the question of damages. The following shall constitute the court's findings:

The plaintiff was aged forty-five years at the time of his employment on the SS NEVADAN. Previous to this trip he had been employed as a clerk in the New York office of the defendants. He joined the SS NEVADAN as Purser at Los Angeles, California, on May 26, 1955 when he signed shipping articles for a voyage to European ports and return.

On June 24, 1955, he fell and suffered a dislocation of the right shoulder, with a fracture of the greater tuberosity of the right humerus, injuries to the left knee and to the left elbow.

Plaintiff received hospital treatment at Bordeaux, France, and at Bremerhaven, Germany, until about July 23, 1955, when he was repatriated to the United States. He began outpatient treatment at the U. S. Public Health Service Hospital, Staten Island, on July 26, 1955. The

plaintiff entered the hospital as an in-patient on August 22, 1955 and received treatment until September 20, 1955 during which period of time he underwent an operation removing the tip of the acromion process of the right scapula to reduce limitation of motion in the right shoulder. He received further outpatient care until November 2, 1955, when he was marked fit (115) for duty and advised to return to work. However, at his request and as a result of the suggestion of Dr. Harold F. Laroe, plaintiff was given further physiotherapy as an outpatient and again marked as fit for duty on January 18, 1956.

Again in March of 1956 plaintiff was examined by Dr. Laroe who found a slight improvement in the range of motion in the right shoulder and it was the opinion of Dr. Laroe that the injury sustained would be one of a permanent nature.

Other than the treatments and examinations had for this trial there is no indication that the plaintiff has sought any further treatment with regard to the injury sustained.

After deliberation with regard to the nature of the injuries sustained, the past pain and suffering, and what reasonably could be expected in the future, it is the opinion of this court that Twelve Thousand ($12,000) Dollars should be awarded to the plaintiff for such pain and suffering.

With respect to the question of loss of past wages and what might be expected in the future, the court notes the following:

(116) Prior to World War II plaintiff had worked as a shore side clerical employee for the defendant in New York. He sailed as ship's purser during part of the war period from 1941 to 1944. Subsequently in 1950 or 1951, the plaintiff made two trips as purser on a Victory ship but he had worked ashore otherwise from 1944 until May, 1955, when he joined the SS NEVADAN. Sometime in 1956, after plaintiff was discharged from the United States

Supplemental Findings of Fact and Conclusions of Law of United States District Court for the Southern District of New York

Public Health Service Hospital, he took up residence in Miami, Florida, where he has lived ever since, working in the Operations Department of various small steamship companies.

Plaintiff received wages up to July 18, 1955, which date marked the end of the voyage of the SS NEVADAN. He was marked fit for duty on January 18, 1956. If the plaintiff had been a seaman during that time his monthly wage rate would have been $472.98 plus reasonably expected overtime at the rate of $300 per month, making a total of $772.98 per month. On this basis, it is the court's opinion that the plaintiff should recover this amount for the seven months during which he was incapacitated, namely, Five Thousand Four Hundred Ten Dollars and Eighty Six Cents ($5,410.86). The court notes hat on January 18, 1956, the plaintiff was marked fit for duty and could have returned (117) to work as a purser on board a ship. However, the plaintiff has chosen to seek out clerical work shore-side in the Miami area. It was the considered opinion of Dr. Tuby that the plaintiff would in no way be limited in his performance of clerical duties as the result of this injury.

It is, therefore, the opinion of this court that the disability plaintiff has suffered will not in any way hinder his future earnings as a clerical worker.

There is no claim for medical expenses incurred by the plaintiff inasmuch as all of his treatment has been rendered by the U. S. Public Health Service.

The Court accordingly awards the plaintiff the sum of Seventeen Thousand Four Hundred Ten Dollars and Eighty Six cents ($17,410.86).

So ordered.

Dated, New York, N. Y., March 14, 1963.

GREGORY F. NOONAN,
U. S. D. J.

Judgment of United States District Court

(132) This cause having duly come on to be heard on December 14, 1962, under the provisions of Rule 42(b) of the Federal Rules of Civil Procedure, upon the pleadings and proofs, and having been tried and submitted by the attorneys for the respective parties, and the Court after due deliberation having rendered its Findings of Fact and Conclusions of Law, said Findings of Fact and Conclusions of Law having been duly filed on January 11, 1963, and the Court having held a hearing on the question of damages on February 1, 1963, and the Court after due deliberation having rendered its supplement to the Findings of Fact and Conclusions of Law, said Supplemental Findings of Fact and Conclusions of Law having been duly filed on March 14, 1963, directing a judgment in favor of the plaintiff, Robert F. Trost, against the defendant, American-Hawaiian Steamship Company, in the sum of $17,410.86, with costs,

Now, it is

ORDERED, ADJUDGED and DECREED, that the plaintiff, Robert F. Trost, recover of and from the defendant herein, American-Hawaiian Steamship Company, the sum of $17,410.86, (133) together with plaintiff's costs as taxed in the sum of $287.55, amounting in all to the sum of $17,698.41.

Dated: New York, N. Y.
April 3, 1963.

G. F. NOONAN,
U. S. D. J.

JUDGMENT ENTERED 4/5/63

JAMES E. VALECHE,
Clerk.

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FILED
MAR 13 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

No. 857

ROBERT F. TROST,

Petitioner,

against

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,

Respondent.

BRIEF OF RESPONDENT, AMERICAN-HAWAIIAN STEAMSHIP COMPANY, IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GRAY WILLIAMS,
Counsel for Respondent,
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116 John Street,
New York, New York 10038.

INDEX

	PAGE
Statement Regarding Petition	1
Statement Regarding Previous Proceedings	1
Statement of the Facts of Petitioner's Action	1
POINT I—The Court of Appeals did not commit error in holding that there was no negligence on the part of the ship's captain	2
POINT II—The Court of Appeals did not commit error in holding that the acts of the captain created no derivative liability on the part of the shipowner	5
Conclusion	6

CITATIONS

Farrell v. United States (2d Cir. 1948), 167 F. 2d 781	3
Paul v. United States (3d Cir. 1953), 205 F. 2d 38	3
Robinson, admx. v. Northeastern SS Corp. (2d Cir. 1956), 228 F. 2d 679	4, 5
Thurnau, admx. v. Alcoa Steamship Co. (2d Cir. 1956), 229 F. 2d 73	5
Wheeler v. West India SS Co. (2d Cir. 1953), 205 F. 2d 354	3, 4

Statement Regarding Petition

This petition seeks review of a finding in the court of appeals that there was no Jones Act negligence under the facts presented. That holding is not in conflict with the applicable decisions of this court and it is not in conflict with the decision of any other court of appeals.

Statement Regarding Previous Proceedings

This action was instituted to recover damages for personal injuries under the Jones Act (46 U.S.C. 688) by a ship's purser. He was injured while ashore in Bordeaux, France, when he stepped into an open trap door in a public cafe while in the company of the ship's captain.

The case was tried without a jury in the district court. That court awarded the petitioner damages, holding that the shipowner was negligent because the captain failed to warn the purser of the opening in the floor.

The decision was reversed in the court of appeals, the late Judge Charles E. Clark dissenting (324 F. 2d 255). A motion for rehearing was denied, Judge Clark dissenting, and a petition for rehearing, *in banc*, also was denied, all of the active judges concurring, except Judge Clark.

Statement of the Facts of Petitioner's Action

At the time of his accident, the petitioner was a forty-five-year-old ship's officer, serving as purser of the respondent's steamship *Nevadan*. He had gone ashore in Bordeaux with the captain to attend to ship's business at the American Consulate some four or five miles away from the ship.

After completing their business at the Consulate, the pair set out for the office of the ship's agent. While on their way, they stopped at a cafe to exchange five dollars U. S. currency into French francs and to have coffee.

The two men sat at a counter, side by side, the captain sitting between the petitioner and the front door of the cafe. While they were thus seated, workmen delivered produce to the cafe, in the course of which delivery they left open a trap door in the floor at the end of the counter some fifteen feet away from the pair. The opening was about five feet long and two and one-half feet in width.

When the captain and the petitioner had finished their coffee, they proceeded to leave the cafe, walking in single file with the captain leading the way. Although the captain was five inches shorter than the petitioner, the petitioner says that he was not able to see over the captain's shoulder. When they reached the end of the counter, the petitioner claims that the captain stepped aside to avoid the opening. The petitioner proceeded straight ahead and his right foot went into the open place, causing him to fall.

The district court found that the captain was negligent in failing to call the opening to the petitioner's attention. Reversing that ruling, the court of appeals held that the captain was not negligent because he was under no legal duty to warn the purser of the condition of the floor. It held further that even assuming the captain had been negligent, his failure to call the opening to the attention of the purser was not within the scope of the captain's employment as to impose derivative liability on the shipowner.

POINT I

The Court of Appeals did not commit error in holding that there was no negligence on the part of the ship's captain.

The petitioner was a mature ship's officer in full control of all of his faculties. The opening in the floor was clear, obvious and readily to be observed through the reasonable

use of the senses. Both the captain and the petitioner had the same opportunity to become aware of the danger and it was reasonable for the captain to assume, as he did, that the petitioner was equally conscious of the opening. In the light of those facts, the decision of the court of appeals is entirely in accord with the settled authorities.

For example, in *Farrell* v. *United States* (2d Cir. 1948), 167 F. 2d 781, the libelant was a young seaman who received injuries ashore in an Italian port when he fell into an open dry dock on his way to the ship. It was held that failure to warn him of the dangerous condition of the dock area was not negligence rendering the shipowner liable where that condition was obvious.

In *Paul* v. *United States* (3rd Cir. 1953), 205 F. 2d 38, the seaman involved had sustained injuries ashore at Brindisi, Italy. The ship was moored to a long dock over which ran a cement walkway. There were no railings or lights and while on his way ashore after dark, the man fell into a deep recess in the walkway. Although the dock was neither owned nor controlled by the shipowner, the seaman contended that the shipowner was liable to him for failing to inspect and warn him of the existence of the hazard. The court of appeals held that the shipowner had no duty to the seaman to warn him of the condition. In disposing of the contention that a guardian-ward relationship between the shipowner and the seaman required the shipowner to warn the seaman of the hazard, the court said:

> "On that score, it should be noted that when we say that seamen are the wards of admiralty, we do not thereby mean to throw open the gate to liability for any and all injuries which befall them."

To similar effect is *Wheeler* v. *West India SS Co.* (2d Cir. 1953), 205 F. 2d 354. There the injured seaman was a second assistant engineer of a vessel tied up to a mole

at the end of a viaduct over which railroad trains passed and which was neither owned nor controlled by the shipowner. The engineer had gone ashore in the afternoon and was returning to the ship over the unlighted viaduct when, without warning, he was injured by a locomotive backing down the viaduct. In holding that the shipowner was not negligent, the court pointed out that there was no duty on the part of the shipowner to warn crew members against open and obvious risks or to warn them that the railroad tracks were used by trains in the nighttime.

In *Robinson, admx.* v. *Northeastern SS Corp.* (2d Cir. 1956), 228 F. 2d 679, the decedent and another crew member returned to the ship through a customs compound during the early morning hours. The decedent was drunk. At the gate of the compound, while the other man was talking to the taxi driver, the decedent got out of the cab and disappeared. About an hour later, his body was found inside the compound and he had been run over by a locomotive. Neither the locomotive nor the compound was owned or controlled by the shipowner. The court of appeals held that in the absence of a showing that the fellow seaman's action in assisting the intoxicated seaman to the ship was either requested by the shipowner or authorized by it, negligence on the part of the fellow seaman could not be imputed to the shipowner. The district court also had found that the shipowner owed no duty to the decedent to warn him. Appeal from that part of the district court decision was abandoned by the plaintiff-appellant but the court of appeals commented that it would have held that the ruling of the district court was correct, citing *Wheeler* v. *West India SS Co.* (*supra*) and *Farrell* v. *United States* (*supra*).

Bearing in mind the need for liberal construction of the Jones Act in seamen's cases, there is no basis for holding that there was negligence on the part of the captain here.

POINT II

The Court of Appeals did not commit error in holding that the acts of the captain created no derivative liability on the part of the shipowner.

The holding of the court below that, in any event, there was no foundation for a claim of derivative liability against the shipowner is well supported by the applicable authorities, *Robinson, admx.* v. *Northeastern SS Corp.* (*supra*); *Thurnau, admx.* v. *Alcoa Steamship Co.* (2d Cir. 1956), 229 F. 2d 73. In the latter case, the court refused to impute to the shipowner liability under the Jones Act for a shoreside fatality arising out of an automobile accident. The decedent was the third mate of the defendant's vessel, riding as a passenger in a motor car negligently driven by a fellow crew member on their way to duty aboard the ship.

The petitioner here has cited one hundred and one cases in support of his application. It does not seem necessary or appropriate to attempt to review or analyze those decisions in such a proceeding as this is, except to point out that the cases cited by the petitioner refer either to facts involving accidents on shipboard, or in areas closely adjacent to the ship and under the control of the shipowner, or to assaults by "unseaworthy" crew members, and those decisions are not precedents properly to be applied to the facts involved in this petition. Not one of the decisions mentioned by the petitioner is authority to support a holding that the captain here owed a duty to warn the petitioner of the open and obvious condition of the floor of the cafe or that the captain's failure to warn the petitioner could impute negligence to the respondent shipowner.

As appears from the decisions which we have previously offered, there is not involved in this matter any question concerning the application of the Jones Act which has not

already been settled. In addition to the two judges comprising the majority of the original appeal panel, six other active judges of the court of appeals were in agreement that a rehearing, *in banc*, would not be justified. It would seem to follow that this is not a matter for further review by the Supreme Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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FILED
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Supreme Court of the United States

October Term, 1963

No. 857.

ROBERT F. TROST,

Petitioner,

against

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

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INDEX

Cases Cited

	PAGE
Farrell v. United States, 167 F. 2d 781	2
McAllister v. Cosmopolitan, 169 F. 2d 4	3
McAllister v. United States, 348 U. S. 19	4
Paul v. United States, 205 F. 2d 38	2
Robinson v. Northeastern, 228 F. 2d 679	3, 5
Thurnau v. Alcoa, 229 F. 2d 73	5
Wheeler v. West, 205 F. 2d 354	2

Supreme Court of the United States

October Term, 1963

No. 857

ROBERT F. TROST,

Petitioner,

against

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

The questions involved herein are (1) whether a Court of Appeals may subvert the purpose of the "clearly erroneous rule" by expediently affirming the findings of the trial Court, yet drawing conclusions as to negligence and contributory negligence dependent upon findings directly contrary to those of the trial Court, and (2) whether a Court of Appeals can destroy a suit predicated upon the negligence of a ship's Master by holding that his act was outside the scope of his employment, although directly opposed to the findings of the trial Court, thus eliminating the wrongdoer as a fellow-servant and creating an artificial distinction between land and ship accidents by imposing upon the seaman the burden of his own safety from unknown dangers while ashore in the course of his employment.

The basic ruling of the majority of the Appellate Court was predicated upon the trap door opening being obvious to the petitioner.[1]

---

[1] The cases cited in the opinion of that Court turned upon the prior knowledge of the condition by the injured seaman with concomitant lack of control and actual notice to the shipowner.

The trial Court herein found the Master to have notice of the condition with absence of knowledge to the petitioner, that the danger was not open and notorious. There can be no doubt but that the Court of Appeals erroneously took upon itself the right to rewrite the findings of the trial Court. Its language described the petitioner's footsteps as "errant" and the Master as not having to act as a "nautical seeing eye dog." The entire thrust of the trial Court's ruling was obliterated by the Appellate Court's realization that it could not overrule the findings (since they were so obviously substantiated by the evidence) leading to the incredible affirmance of the trial Court's findings coupled with conclusions predicated upon findings totally opposite to those of the lower Court.

The cases cited by the respondent are readily distinguishable from the case at bar. *Farrell* v. *United States*, 167 F. 2d. 781 (2c), involving a crewman returning from shore leave through the wrong gate, going into a compound area entirely separated from the vessel, and injured, held that the condition was open and obvious, that there was no danger in the proper compound area, that it was not foreseeable that the seaman would enter the wrong gate to return to the vessel.

Paul v. *United States*, 205 F. 2d 38 (3C) involved a return from shore leave in an area not under the shipowner's control. Held that there was no notice to the shipowner, thus no duty to inspect and warn. The Court stated that there was no duty to inspect premises of another where there was neither control of premises nor notice of the unsafe condition. Noteworthy was the dissent of Judge Biggs, affirming the duty to warn upon notice of the condition.

Wheeler v. *West*, 205 F. 2d 354 (2C), affirmed on the lower Court's opinion, 103 F. Supp. 631, was a shore leave case involving an accident when returning to the ship via a

viaduct. The trial Court had found that the shipowner had no control of the viaduct and no actual knowledge of the absence of lights or that a locomotive was being operated on the viaduct itself. Holding the viaduct's condition to be open and obvious to the seaman and to the Master, the Court pointed out that the locomotive was in use at 2:00 a.m., that an inspection at an earlier time would not have disclosed the locomotive's movement and would not have aided the plaintiff.

Again, the Court indicated the importance of notice of a shoreside condition to the Master in citing *McAllister* v. *Cosmopolitan*, 169 F. 2d 4, rev'd other grounds, 337 U. S. 783.

Robinson v. *Northeastern*, 228 F. 2d 479 (2C), involving a seaman returning from shore leave killed by a locomotive in the compound area neither owned nor controlled by the shipowner, held that there was no duty to warn of the danger.[2]

The cases are all consistent with the petitioner's position. This case involves the duty to safeguard from a dangerous condition, known to the shipowner through its Master, and unknown to the petitioner. The decision by the Court below created the setting for destruction of that duty in substituting the primary responsibility of a shipowner to safeguard its seamen for a test consisting primarily of measuring the distance between the accident site and the ship.

The dissent by Circuit Judge Clark that the Master was guilty of "rather gross negligence" in view of his

[2] The writer was the plaintiff's attorney in the *Robinson* case. The issue of failure to warn was expressly abandoned since there was a lack of any evidence to show notice of the presence of locomotives to the shipowner. This is a conformity with the rule asserted by the petitioner herein—that only where there is both lack of control (giving rise to possible constructive notice) and no actual notice of the condition—no duty to warn would arise.

knowledge of the open trap door coupled with the lack of such knowledge by the petitioner was fully consistent with the findings of the trial Court and on settled principles of law should have been the ruling of the Court below. That it wasn't is inexplicable and has paved the way for Appellate Courts to destroy the force of trial Court findings by appeal *de novo*, in contradiction to this Court's "clearly erroneous" doctrine in *McAllister* v. *United States*, 348 U. S. 19. It has set the stage for enormous inroads in the shipowner's duty to protect its seamen while ashore in the course of their employment in furtherance of ship's business and has again created improper distinctions between land and ship accidents, seemingly so thoroughly obliterated in the *O'Donnell*, *Senko* and *Braen* cases. The burden of safety in the presence of unknown danger has now been cast upon the worker in contradiction to every humanitarian principle underlying the enactment of the Jones Act, remedial legislation, as uniformly interpreted by the judiciary for the past forty odd years and is a return to a bygone era of rampant injustice in the working conditions afforded seamen by shipowners.

It would seem to require consideration and reversal by this Court in order to once again establish uniformity of decision.

As to the question of derivative liability, if the Master was indeed within the course of his employment when he negligently permitted the petitioner to fall, the shipowner's liability under the doctrine of respondeat superior would follow. The decision of the Court below was that the Master was, in some manner, only a volunteer, that he somehow left the shipowner's employ. When and how the sudden change was effected was not answered in spite of the rather obvious continuation of the shipowner's duty to provide the petitioner with a safe place to work. If that concept of duty had any validity it could not be negated by the arbitrary statement of a litigant shipowner as to

whether the employee was authorized to be in the ship's service at the moment of the accident.

The trial Court found derivative liability to the shipowner as a result of the Master's negligent act, committed during the period when the shipowner's primary duty to provide a safe place to work was existent and when petitioner and the Master were completing their duties on behalf of the owner.

The *Robinson* case, 228 F. 2d 679, *supra*, questioned whether a seaman on shore leave, returning to his vessel and volunteering to aid a drunken shipmate could, by his negligence, hold the shipowner liable when the activity was never within the customary duty of men on shore leave, thus never authorized by the shipowner.

Thurman v. Alcoa, 229 F. 2d, 73, rejected the thought that the shipowner had the duty to seaman on shore leave to provide safe transportation while ashore, again, lacking control and notice.

In neither case did the facts ever give rise to a duty from the shipowner to the seaman to care for the latter's safety. In the case at bar the shipowner's duty to provide a safe place to work was limited only by both lack of control and actual notice of danger, and knowledge of the opening was painfully apparent to the Master.

A concept of derivative liability dependent only upon evidence of specific authorization of the particular act is, in fact, an oblique approach to the defense of fellow-servant negligence. In the usual common law suit the doctrine of respondeat superior is not applicable to accidents arising out of negligence by a co-worker. In the instant matter, liability was negated by lifting the wrongdoer out of the employment status, thus leaving the shipowner free of actual notice. It astonishingly eliminated the fellow-servant rather than the fellow-servant rule. As such the decision of the Court below should be reversed

as an incorrect guideline leading to the negation of the shipowner's long settled duty of due care to provide a safe place to work.

The artificial barrier of specific authorization erected by the Court below placed the injured seaman at the none too tender mercies of the shipowner and should not be permitted to create an incorrect standard of conduct in future shore-side accidents as distinguished from those occurring aboard ship. As was said by Circuit Judge Clark in dissent, "Since they were on ship's business and since there is no question of contributory negligence, the moderate award made the plaintiff should stand."

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: March 24, 1964.

Respectfully submitted,

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HARVEY GOLDSTEIN,
On the Petition.